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Re: Freedom of Information Act (FOIA) Request

Dear FOIA Officer:

The Center for Water Security and Cooperation (“CWSC”) makes this request for records pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and Environmental Protection Agency (“EPA”) regulations at 5 C.F.R. part 2604. These records pertain to the Proposed 2022 Clean Water Act Financial Capability Assessment Guidance (“2022 Proposed FCA Guidance”)¹

Specifically, the CWSC requests records pertaining to the historical application and development of the 1997 Combined Sewer Overflows—Guidance for Financial Capability Assessment and Schedule Development (“1997 FCA Guidance”),² the historical application and development of the 2014 Financial Capability Assessment Framework for Municipal Clean Water Act Requirements (“2014 FCA Framework”),³ and the development of the 2021 Financial Capability Assessment Guidance (“2021 FCA Guidance”),⁴ as detailed below:

1. As noted in the 2022 Proposed FCA Guidance, “EPA has used both the 1997 FCA Guidance and the 2014 FCA Framework to support consent decree negotiations with over 100 wastewater utilities throughout the United States and U.S. territories.”⁵ The Guidance also states: “[t]he results of the FCA analyses provide an important benchmark for EPA decision-makers to consider in CWA permitting and enforcement actions to support consistency across the country.”

We request any and all Financial Capability Assessments analyses and any other relevant

¹ U.S. Env. Prot. Agency, *Proposed 2022 Clean Water Act Financial Capability Assessment Guidance* (February 2022), available at: https://www.epa.gov/system/files/documents/2022-02/2022-proposed-fca_feb-2022.pdf.

² U.S. Env. Prot. Agency, *Combined Sewer Overflows—Guidance for Financial Capability Assessment and Schedule Development*, Rpt. No. EPA 832-B-97-004 (1997), available at: <https://www.epa.gov/sites/default/files/2015-10/documents/csofc.pdf>.

³ U.S. Env. Prot. Agency, *Financial Capability Assessment Framework for Municipal Clean Water Act Requirements* (November 24, 2014), available at: https://www.epa.gov/sites/default/files/2015-10/documents/municipal_fca_framework.pdf.

⁴ U.S. Env. Prot. Agency, *2021 Financial Capability Assessment Guidance* (January 2021) (rescinded February 22, 2022), final pre-publication version available at: https://www.epa.gov/sites/default/files/2021-01/documents/2021_fca_guidance_-_january_13_2021_final_prepub.pdf.

⁵ 2022 Proposed FCA Guidance, p. 7.

analyses, reports, reviews, or additional assessments performed or created that were used to inform or determine the implementation schedule and deadlines for implementing control measures or completing projects under the consent decree and Long Term Control Plans. We request this information for the following seven consent decrees:

-United States and Texas v. City of Corpus Christi, Texas (Civil Action No. 2:20-cv-00235) (S.D. Tex. 2020);⁶

-United States and Mississippi v. City of Hattiesburg, Mississippi (Case No. 2:20-cv-00158-KS-MTP) (S.D. Miss. 2020);⁷

-United States and New Hampshire v. City of Manchester, New Hampshire (Case No. 1:20-cv-00762) (D.N.H. 2020);⁸

-United States, Texas and Bayou Riverkeeper v. City of Houston, Texas (Civil Action No. 4:18-cv-03368) (S.D. Tex. 2019);⁹

-United States and Mississippi v. City of Meridian, Mississippi (Case No. 3:19-CV-427-DPJ-FKB) (S.D. Miss. 2019);¹⁰

-United States and Ohio v. City of Middletown, Ohio (Civil Action No. 18-cv-90) (S.D. Ohio 2018);¹¹

-United States and Indiana v. Sanitary District of Hammond (Civil Action No. 2:17-cv-00048) (N.D. Ind. 2017).¹²

2. As noted in the 2022 Proposed FCA Guidance, “[t]he results of the FCA analyses provide an important benchmark for EPA decision-makers to consider in CWA permitting and enforcement actions to support consistency across the country”.¹³ **Please provide any and all written reports, analyses, or other assessments of FCA “consistency” and “benchmark[ing].”**

⁶ Final consent decree available at: <https://www.epa.gov/sites/default/files/2020-09/documents/corpuschristi-cd.pdf>

⁷ Final consent decree available at: <https://www.epa.gov/sites/default/files/2020-10/documents/cityofhattiesburg-cd.pdf>

⁸ Final consent decree available at: <https://www.epa.gov/sites/default/files/2020-07/documents/cityofmanchesternh-cd.pdf>

⁹ Final consent decree available at: <https://www.epa.gov/sites/default/files/2019-08/documents/cityofhouston-cd.pdf>

¹⁰ Final consent decree available at: <https://www.epa.gov/sites/default/files/2019-09/documents/meridian-cd.pdf>

¹¹ Final consent decree available at: <https://www.epa.gov/sites/default/files/2018-04/documents/middletown-cd.pdf>

¹² Final consent decree available at: <https://www.epa.gov/sites/default/files/2017-02/documents/hammondsanitarydistrict-cd.pdf>

¹³ Proposed 2022 FCA Guidance, p. 7.

For the requests listed above in (1), EPA has used the 1997 FCA Guidance and the 2014 FCA Framework to create compliance schedules under these consent decrees, which were then approved by the agency. This indicates an express adoption of the reasoning of this guidance, based on EPA's application of the 1997 FCA Guidance and the 2014 FCA Framework in these decrees. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 168 (1975); *Elec. Frontier Found. v. United States DOJ*, 739 F.3d 1, 9-10 (D.C. Cir. 2014). As these consent decrees were then provided to the public for notice and comment, EPA's justification for the extended timeline became critical information, necessary for the public to provide informed notice and comment on the decree.

For the requests listed above in (2), because EPA is relying on the results of FCA analyses and adopting their reasoning as part of CWA permitting and enforcement actions, disclosure of these analyses, and any reports on those analyses, is critically important. Because these are being adopted both as part of EPA actions on CWA permitting and enforcement, as well as in the 2022 Proposed FCA Guidance, it is clear that these analyses and benchmarks have been expressly adopted by the Agency. This information is critically important for the public to be able to understand how existing and past FCA applications have been evaluated in order to provide effective comment on the 2022 Proposed FCA Guidance.

If it is your position any portion of the requested records is exempt from disclosure, the CWSC requests that you provide it with an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). If some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. *See* 5 U.S.C. § 552(b). If it is your position that segregation is impossible, please state what portion of the document is non-exempt, and provide a description of the document. *See Mead Data Central v. U.S. Dep't of the Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977).

We request that documents produced in response to this request are emailed in electronic .PDF format to the email address included in the signature block below. Please release responsive records on a rolling basis as you are able to locate and release them. If you determine that any of the records described above are already publicly available, please let us know where we can find them.

FEE WAIVER REQUEST

In accordance with 5 U.S.C. § 552(a)(4)(A) and agency regulations, the CWSC requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures likely will contribute to a better understanding of relevant government procedures by the CWSC and the general public in a significant way. *See* 5 U.S.C. § 552(a)(4)(A)(iii). Moreover, the request primarily and fundamentally is for non-commercial purposes. *See, e.g., McClellan Ecological v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).

The frequency and specifics of when the FCA is used of general public interest. Enforcement of environmental protections, in particularly the Clean Water Act, are seen as a critical component

of redressing climate change and preventing the spread of pollution and the depredation of the environment.

In addition, the consent decrees that are agreed to in these enforcement actions are already provided for public notice and comment. Not only does this indicate an existing compelling public interest in understanding how these consent decrees are created, but also a need for the public to have information about how the timelines for remediation or compliance are determined. This information will allow affected persons to better understand these decrees, to understand how compliance schedules were derived, and to provide more effective and educated comments to EPA.

The environmental justice impacts of the FCA are also critically important to disadvantaged communities. The FCA delays the full weight of enforcement of environmental protections for years, sometimes decades, leaving poorer—often minority—communities under increased threat. Understanding where the FCA has extended compliance and enforcement schedules will help citizens engage more fully and more intelligently on these protections.

The CWSC is a Washington, D.C.-based non-profit corporation, organized under section 501(c)(3) of the Internal Revenue Code. The CWSC is committed to ensuring that the law is used to advance water security for all people, in the U.S. and abroad, and to encourage greater understanding and cooperation on issues of law and governance in the water sector. The CWSC uses a combination of research, education, and advocacy to advance its mission. The CWSC intends to analyze the information responsive to this request and to share its analysis with the public through reports, press releases, educational programs, or other means. In addition, the CWSC will disseminate any documents it acquires from this request to the public through its website, www.ourwatersecurity.org. The CWSC does not have a financial interest in the release of this information, merely an interest in understanding how the 2022 Proposed FCA Guidance will be used based on historical examples, and ensuring that equity, environmental justice, and civil and human rights are served by its use.

For these reasons, EPA should waive all fees associated with this request. If for any reason this request for fee waiver is not granted, please contact me at the phone number below before incurring any fees.

Thank you for your attention to this request. Please feel free to contact me at (202) 796-8546 if you have any questions.



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